Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

CAPTAIN VINCENT L. FILIPKOWSKI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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April 2003

QUESTION PRESENTED

Whether consensual internet conversations between two adults can form the basis of a criminal prosecution under 18 U.S.C. § 2422(b), in light of the clear language of the statute and this Court's holding in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), where one of the participants falsely claims to be 15 years old.

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The petitioner, Captain Vincent L. Filipkowski, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on January 9, 2003.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Filipkowski*, USCA Dkt. No. 02-0581/AF (January 9, 2003), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM 34056, March 29, 2002) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on January 9, 2003.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." The Due Process Clause of the Fifth Amendment to the United States Constitution states that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

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[1] Appendix A, page 1a.

Section 2422(b) of Title 18, United States Code, states the following:

> (b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

STATEMENT OF THE CASE

On December 23, 1998, the petitioner engaged in an Internet chat room "conversation" with an individual using the name "Outdoor Boy FL." These conversations were in fact with another adult, Detective Joseph Kenny. However, Detective Kenny had created a false user profile, which indicated that his Internet character, "Outdoor Boy," was turning 16 years old the next day.

The transcripts of the chats show that it was "Outdoor Boy" who repeatedly turned the conversation towards sexual matters. At one point, the petitioner responded to "Outdoor Boy's" repeated emphasis on sex by accusing him of only wanting to communicate through cyber sex and of being too focused on that topic. The petitioner told "Outdoor Boy" that he did not want to do that, and he repeatedly emphasized that he was in no hurry to meet "Outdoor Boy." "Outdoor Boy" insisted on meeting that day, apparently because the detective knew it would not be illegal for "Outdoor Boy" to engage in sexual activity after he turned 16 years old. Later that day, the petitioner ultimately agreed to "Outdoor Boy's" requests for a meeting and was arrested at a local shopping mall.

However, the petitioner testified that he did not believe "Outdoor Boy" would show up and that he did not believe he was really a 15-year-old boy. The petitioner testified at trial regarding the "fantasy" aspect of his Internet conversations and explained that he did not know whether "Outdoor Boy" was a minor or an adult or whether he was male or female. His conversations with this "person" were part of the Internet's "virtual world" where people often speak and act untruthfully or inaccurately.

This was corroborated by the testimony of Professor Brian Ott, an expert in media and culture studies, as well as in computer-mediated communication. Professor Ott testified about the unique aspects of the Internet's "virtual culture" and the different types of communication styles that exist on line. A user's inability to see the nonverbal communication of the other party requires total reliance on the verbal communication, breeding a "culture of skepticism" within the Internet community. Frequent users of the Internet engage in chats and other communications expecting, or at least suspecting, that some or all of the information that they are getting back may not be accurate.

If a minor had actually arrived at the meeting, the petitioner testified that he simply intended to talk to him about the struggles of being a gay teenager in today's society. The petitioner had undergone similar struggles when he was growing up, as he observed his family and society reject his homosexual uncle and others. When he was a teenager, the petitioner contemplated suicide while he was dealing with the pressure of his sexuality. He had read studies relating that gay teenagers are 30% more likely to commit suicide than straight teenagers are. This stems from their feelings of fear, rejection and isolation from friends and family members, along with the normal struggles of being a teenager. For a teenager in that circumstance to have someone tell him that "it's okay and you're going to be all

right and successful" can be very helpful. If it turned out that "Outdoor Boy" was a teenager, the petitioner believed that he could help "Outdoor Boy" by explaining these things to him. He adamantly denied any intention to engage in sexual activity with "Outdoor Boy."

On September 22-27, 1999, the petitioner was tried by a general court-martial convened at Peterson Air Force Base, Colorado. Contrary to his pleas, the petitioner was found guilty of, *inter alia*, one specification of violating 18 U.S.C. § 2422(b) for using a facility or means of interstate commerce (the Internet) to attempt to knowingly persuade, induce, entice or coerce an individual who has not attained the age of 18 to engage in a sexual activity for which any person can be charged with a criminal offense. This specification was charged under Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, which authorizes courts-martial to try military members for conduct that violates federal law. Petitioner was sentenced to a dismissal, confinement for two years and total forfeitures of his pay and allowances.

On March 29, 2002, the Air Force Court of Criminal Appeals affirmed the petitioner's conviction. This decision was released several weeks before this Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) [hereinafter "*Free Speech Coalition*"]. The petitioner appealed that decision to the United States Court of Appeals for the Armed Forces, disputing the constitutionality of his conviction in light of this Court's *Free Speech Coalition* decision. On January 27, 2003, the United States Court of Appeals for the Armed Forces granted review of the petitioner's case and simultaneously affirmed his conviction in a summary disposition.

REASONS FOR GRANTING THE WRIT

The petitioner's conversations were conducted with an adult who was posing as a 15-year-old child. The government utilized the "attempt" portion of 18 U.S.C. § 2422(b) and convicted the petitioner of "attempting" to knowingly persuade, induce or entice a child under 18 to engage in unlawful sexual activity. This conviction is contrary to the clear language of the statute and cannot withstand constitutional scrutiny under the First Amendment.

As this Court has noted, "absent a clearly expressed legislative intent to the contrary, [the statutory] language must ordinarily be regarded as conclusive." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). The plain language of the statute demonstrates that the petitioner's conduct is not a federal offense. The statute makes it unlawful for anyone to attempt to knowingly persuade, induce, entice or coerce **any individual who has not attained the age of 18 years**. 18 U.S.C. § 2422(b) (emphasis added). This language is unambiguous and clearly requires the involvement of an individual under the age of 18. In order to "attempt to persuade" a person under 18 to engage in a criminal sexual act, one must communicate that language to an actual person under 18, yet be unsuccessful in those persuasion efforts.

The legislative history of this statute also demonstrates that the statute does not proscribe sexual conversations when no one under 18 years old is involved. Normally, courts will not "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). However, the legislative history of this statute further bolsters the plain and unambiguous statutory language. Subsection (b) of 18 U.S.C. § 2422(b) was added to the statute in 1996 as part of the Telecommunications Communication Act of 1996. P.

Law 104-104, 110 Stat. 137. It was enacted the same year as the Child Pornography Protection Act, aspects of which were ruled unconstitutional by this Court in its *Free Speech Coalition* decision.

According to the Committee Report on the statute, this section was added to support Congress's "need ... to take effective action to protect children and families from online harm." S. Rpt. 104-230 (February 1, 1996). The Report also referenced a July 24, 1995, Senate Judiciary Committee hearing regarding "online indecency, obscenity, and child endangerment. The record of this hearing supports the need for Congress to take effective action to protect children and families from online harm." *Id.* Clearly, Congress's concern in enacting this legislation was to limit some speech in order to protect actual children from being harmed through contact with someone over the Internet. However, in the petitioner's case, the statute was used to convict him of engaging in speech with an adult posing as a minor.

In 1998, members of the House of Representatives introduced legislation that included proposed changes to this statute. Those changes would have explicitly criminalized "knowingly contacting an individual, who has been represented to the person making the contact as not having attained the age of 18 years." Child Protection and Sexual Predator Punishment Act of 1998, H.R. 3494 § 101, 105th Cong., 2d Sess. (1998). Congress specifically rejected those arguments and thus made clear that the legislature did not intend to cover the conduct charged in the petitioner's case. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Internal Revenue Service v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citations omitted). Here, Congress declined to enact

the provisions pertaining to assumed minors. Given that Congress discarded the language that would have addressed the conduct at issue in petitioner's case, the conduct at issue in this case does not constitute a federal offense.

Petitioner's conviction also is constitutionally infirm. The statute at issue in this case directly implicates First Amendment concerns, as it criminalizes words and statements. Statutes that attempt to restrict or burden the exercise of First Amendment rights "must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-612 (1973). Thus, a statute that attempts to proscribe constitutionally protected speech will not be enforced unless a limiting construction effectively removes the apparent threat to constitutionally protected expression. *Id.* at 613.

"Sexual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997). "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Free Speech Coalition*, 535 U.S. at 244. Applying this principle, 18 U.S.C. § 2422(b) is unconstitutional on its face and as applied to the petitioner if it prohibits a substantial amount of protected expression. Such an impermissible prohibition will and does occur when the statute is applied so expansively as to prohibit attempted persuasion of an adult masquerading as a child under 18, as in petitioner's case.

In the context of child pornography, this Court has held that Congress's attempts to restrain free speech are limited when the material at issue did not involve the use of actual children. *Id.* The Court noted that the First

Amendment prohibits Congress from enacting a statute that makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct. This same logic and analysis should apply when Congress attempts to restrain speech between two adults when one is posing as a child.

In *Free Speech Coalition*, this Court stated that "Congress may pass valid laws to protect children from abuse, and it has.... The prospect of crime, however, by itself does not justify laws suppressing protected speech.... It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities." 535 U.S. at 245. The Court noted that "the government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse," and "without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." *Id.* at 253-254.

In reaching materials that were made without the involvement of children, the statute "abridged the freedom to engage in a substantial amount of lawful speech" and was therefore "overbroad and unconstitutional." *Id.* at 256. These holdings and concepts apply equally to the statute at issue in the petitioner's case.

Congress may pass a law that protects children from abuse, but that statute needs to be limited to the protection of actual children. As noted above, the clear language of 18 U.S.C. § 2422(b) addresses that concern—a person can be convicted of communicating with an actual minor in a successful or unsuccessful effort to persuade the minor to engage in criminal sexual conduct. However, the statute cannot constitutionally be read or applied so broadly as to implicate speech between adults. An Internet conversation

between two adults regarding sexual matters is constitutionally protected.

The petitioner's conversations did not "involve, let alone harm, any children" when they were being conducted. *Id.* at 241. The conversations between the petitioner and the other adult were not obscene. Yet, the "attempt" aspect of the statute as applied to the petitioner prohibited speech "that records no crime and creates no victims by its production." It therefore proscribes a significant universe of speech that is not obscene. As in *Free Speech Coalition*, this statute cannot withstand constitutional scrutiny when applied to a situation that does not involve or harm a child.

CONCLUSION

The petitioner's conduct is not actionable under the clear statutory language of 18 U.S.C. § 2422(b), as well as the legislative history of that statute. Furthermore, his conviction is unconstitutional under this Court's precedents, including *Ashcroft v. Free Speech Coalition, supra.* His conversations with the other adult were protected by the First Amendment and he therefore respectfully requests that this Court grant his petition for a writ of certiorari. Alternatively, the petitioner would respectfully suggest that, in view of the summary affirmance by the Court below, the case be remanded to the United States Court of Appeals for the Armed Forces with instructions to consider the impact of *Ashcroft v. Free Speech Coalition*, *supra*, on its holding.

Respectfully submitted,

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April 2003

Appendix A

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES,	)	USCA Dkt. No. 02-0581/AF
	)	Crim.App. No. 34056
Appellee	)	
	)	
v.	)	ORDER
	)	
Vincent L. FILIPKOWSKI,	)	
	)	
Appellant	)	

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 9th day of January, 2003,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Air Force Court of Criminal Appeals is affirmed.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (HECKER)
Appellate Government Counsel (RIDER)

Appendix B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain VINCENT L. FILIPOWSKI [sic]
United States Air Force

ACM 34056

29 March 2002

Sentence adjudged 27 September 1999 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Amy M. Bechtold.

Approved sentence: Dismissal, confinement for 2 years, and total forfeiture of pay and allowances.

Appellate Counsel for Appellant: Lieutenant Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy and Captain Karen L. Hecker.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Jennifer R. Rider.

Before

YOUNG, BRESLIN and HATTRUP[1]
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was convicted, contrary to his pleas, of disobeying the lawful order of his superior commissioned officer, negligent dereliction of duty, and using a facility of interstate commerce to attempt to persuade, induce, entice, or coerce a person under 18 years of age to engage in sexual activity in violation of 18 U.S.C. § 2422(b). Articles 90, 92, and 134, UCMJ, 10 U.S.C. §§ 890, 892, 934. The sentence adjudged and approved was a dismissal, confinement for 2 years, and forfeiture of all pay and allowances.

The appellant contends that the conviction must be set aside because of unlawful command influence, and that the evidence is legally and factually insufficient to support a conviction under 18 U.S.C. § 2422(b). Through the avenue afforded by *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant contends that the failure to obtain permission to proceed to trial from offices issuing security clearances is a jurisdictional defect, that the evidence is legally and factually insufficient to support the convictions for disobeying an order and dereliction of duty, and that the sentence was inappropriately severe. Finding no error, we affirm.

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[1] Judge Hattrup participated in this decision before her departure from the Court on 28 February 2002.

Background

The appellant worked on highly-classified projects involving satellites and communications at Peterson Air Force Base, Colorado. He was a major-select, with almost 12 years' service at trial time.

In October 1997, his unit commander gave him a written letter of admonishment for using his government computer to maintain statistics for his fantasy football league. The letter of admonishment instructed the appellant to remove any unofficial documents from his government computer, and to use the Internet only for official business. In 1998, during a performance feedback session, another supervisor told him to stop using his government computer for fantasy football. Later that year, a third supervisor told him directly not to use his government computer during duty time to engage in fantasy football and other similar activities not related to his official duties.

In December 1998, the detachment commander ordered a review of the appellant's computer. The analysis revealed that the appellant had opened fantasy football spreadsheets during duty hours 258 times after receiving the letter of admonishment, and that the programs remained opened for up to 4 hours a day. The dates and times he opened the spreadsheets corresponded to times he opened sports statistics sites on the Internet.

At that same time, the appellant was on leave in Jacksonville, Florida, for Christmas. On 23 December 1999, the appellant went on the Internet, using the screen name "SteelerCS." He used the services of America On-Line, and his transmissions were routed through Virginia. The appellant entered a chat room entitled "JAXFL M4M." The abbreviation "M4M" means "men for men," indicating a chat room catering to homosexuals. The appellant began

communicating through instant messages with a person using the screen name "OUTDRBOYFL," who indicated he was 15 years old. Using instant messages, they had a lengthy discussion, which was full of sexual references and innuendo. They agreed to meet that day at a local mall.

In fact, OUTDRBOYFL was a team of police officers working on Central Florida's Child Exploitation Task Force. The police officers intended to arrest the appellant at the mall, but difficulties in printing out the transmissions prevented them from doing so. The police surveilled the appellant as he waited at the mall and later drove away.

The Florida police sent another message to "SteelerCS" explaining that the OUTDRBOYFL was unable to go to the mall. The appellant and OUTDRBOYFL had another discussion through instant messages. It included very explicit sexual matters. The appellant again agreed to meet OUTDRBOYFL at a local store. The Florida police were waiting, and arrested the appellant when he arrived at the meeting place.

The appellant was properly advised of his rights, and agreed to make a statement. He told the police he only intended to counsel the boy, because he seemed confused about his sexuality. He added that "he wasn't even horny," because he had met an 18-year-old male on line the night before, and had oral sex with him. The appellant told the police that he was a homosexual.

After a day in civilian confinement, Florida authorities released the appellant, and he returned to Colorado. Air Force authorities seized his government computer, and suspended his security clearances. He was denied access to the office computer systems, and was assigned duties outside his normal work area, because co-workers often brought classified work to their desks. The

command did not publicize the details of the case at the outset, but the obvious change in circumstances generated rumors and discussion.

The appellant began working on his defense. He obtained numerous letters from co-workers attesting to his good character and duty performance. A few individuals complained that the appellant was pressuring them to provide letters. He asked a lieutenant to help him obtain copies of an earlier e-mail, and she allowed him to use her computer to send a request for the data. Later, she realized that she violated the order denying the appellant access to the office computer systems, and informed her superiors. The command notified the appellant to stay out of the work area, not to access the computer systems, and to contact the command to request data or information for his defense.

In April 1999, trial counsel began interviewing members of the detachment. These interviews sparked gossip and speculation within the unit. The detachment commander, Colonel (Col) Bogenrief, preferred charges against the appellant on 3 May 1999. In anticipation of a formal pretrial investigation, the appellant began collecting character statements from detachment members. This generated more rumors and speculation. On 7 May 1999, at the end of a routine commander's call, Col Bogenrief, read a summary of the charges against the appellant, and reminded unit personnel that the appellant was not to have access to the unit's computer systems.

While court-martial charges were pending, Col Bogenrief made a comment at a staff meeting attended by 10 to 15 people that the appellant was a "dick sucking weasel." Apparently, Col Bogenrief used the expression from time to time in referring to others. It was intended to describe people who were opportunistic and self-serving, rather than

anything relating to sodomy. Some detachment members heard rumors of this comment.

Still later, in a private conversation with several detachment leaders, it was mentioned that the appellant was taking leave to return to Florida to get his car, which had been seized by the Florida authorities. Col Bogenrief advised the appellant's supervisor to "keep an eye" on the appellant, because "he might run his car into a bridge abutment." He then smiled and added a comment to the effect that it might save them all some bother. Rumors of this comment also spread to some members of the detachment.

The appellant learned of the detachment commander's comments shortly before trial. The appellant's counsel advised the prosecutors that they intended to raise an issue concerning unlawful command influence. The prosecutors investigated the matter. In an excess of caution, the government arranged for a meeting with the unit members. Col Bogenrief informed them that the appellant was "innocent until proven guilty," that they were free to assist the defense if they chose, and that there would be no reprisal against anyone who assisted the defense.

Unlawful Command Influence

At a preliminary session of the court-martial, the appellant moved to dismiss the charges because of unlawful command influence. The appellant alleged that the commander created an atmosphere of fear and intimidation within the organization so powerful that witnesses refused to testify to his good character, denying him a defense. The military judge heard evidence and entered extensive findings. The military judge found actual and apparent unlawful command influence. She denied the motion to dismiss, but ordered remedial measures to assure the

appellant's ability to present a defense. The appellant now renews his assertion of unlawful command influence before this Court. We find no basis for relief.

Article 37, UCMJ, 10 U.S.C. § 837, provides, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case." Improper conduct by a commander is known as unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 213 (1994); *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). The burden of production is on the party alleging unlawful command influence. *Stombaugh*, 40 M.J. at 213. While the threshold for raising unlawful command influence at trial is low, it must be more than mere allegation or speculation. *United States v. Biagase*, 50 M.J. 143, 150 (1999); *Stombaugh*, 40 M.J. at 213; *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994).

> [T]here must be something more than an appearance of evil to justify action by an appellate court in a particular case. "Proof of [command influence] in the air, so to speak, will not do." We will not presume that a military judge has been influenced simply by the proximity of events which give the appearance of command influence in the absence of a connection to the result of a particular trial. *United States v. Thomas*, 22 M.J. 388, 396 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 [ ] (1987); *see also United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987) (Cox, J., concurring).

United States v. Allen, 33 M.J. 209, 212 (C.M.A.1991).

> Once the issue of command influence is raised, the government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence. *Biagase*, 50 M.J. at 151.

The military judge heard extensive testimony on the motion. The defense counsel presented the testimony of ten witnesses, including six members of the detachment and the appellant; the prosecution called two witnesses. At the conclusion of the evidence, the military judge entered lengthy findings of fact and conclusions of law.

On issues of command influence, appellate courts review the military judge's findings of fact under a clearly-erroneous standard, but review de novo "the question of command influence flowing from those facts." *United States v. Argo*, 46 M.J. 454, 457 (1997) (quoting *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)). It is necessary to review the evidence and findings regarding these allegations.

Lieutenant Colonel (Lt Col) Samuel Walker indicated that he feared that if he testified on behalf of the appellant, it might affect his ability to get promoted. On cross-examination, Lt Col Walker admitted that he came forward because he was "trying to just protect my six so that I can finish my career."[2] Lt Col Walker explained that Col Bogenrief had an aggressive management style that he found intimidating, but that he had no knowledge of any retaliatory actions taken by the commander. Lt Col Walker also stated that he didn't know the appellant and had no opinion about

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[2] "Six" or "Six o'clock" is term used to refer to the rear of an aircraft.

his character. The military judge made findings of fact relating to Lt Col Walker.

> Applying the law to the facts in this case, I find that Lieutenant Colonel Walker fears that Colonel Bogenrief would engage in reprisal action against those who testify in support of the accused. This opinion appears to be based solely on the commander's brusque and sometimes dictatorial manner. . . . Although there is no evidence that Colonel Bogenrief has intentionally attempted to improperly influence Lieutenant Colonel Walker, it is apparent that his management style has created a very real belief on the part of Lieutenant Colonel Walker that Colonel Bogenrief would engage in unlawful command influence. This constitutes apparent unlawful command influence.

Reviewing the factual findings of the military judge under the "clearly-erroneous" standard, we find them to be amply supported by the record. Lt Col Walker found the commander's authoritarian style intimidating; his exaggerated fear of the commander caused him to speculate about what the commander might do.

Reviewing the military judge's conclusion that this was "apparent unlawful command influence" under the de novo standard, we find the military judge erred. Proof of apparent unlawful command influence must be more than "mere speculation." *United States v. Baldwin*, 54 M.J. 308, 311 (2001); *Biagase*, 50 M.J. at 150; *Johnston*, 39 M.J. at 244. The proof must be such that a reasonable person who was aware of all the facts would conclude that the system was unfair. *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979). *See also United States v. Allen*, 31 M.J. 572, 590

(N.M.C.M.R. 1990); *United States v. Cruz*, 20 M.J. 873, 890 (A.C.M.R. 1985), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987).

In this case, the fact that Col Bogenrief's management style was authoritarian, even if true, would not cause a reasonable person to believe that he would engage in unlawful command influence. *See Allen*, 33 M.J. at 212; *Levite*, 25 M.J. at 341 ([A]n appellant's unsubstantiated assertion that unlawful command influence exists is not going anywhere. . . .); *Green v. Widdecke*, 42 C.M.R. 178, 181 (C.M.A. 1970) ("[G]eneralized, unsupported claims of 'command control' will not suffice to create a justiciable issue.") Lt Col Walker's exaggerated and unsubstantiated fear of reprisal, no matter how sincerely held, is insufficient to justify remedial action.

The military judge also heard the testimony of two witnesses who claimed that they feared reprisal for assisting the defense: Captain (Capt) Julie Plummer and Lt Col Anne Kearney. The military judge found that the fear expressed by Capt Plummer and Lt Col Kearney was based solely upon their perception of the commander's authoritarian management style, and their speculation that he would treat unfairly anyone that opposed him. Both were nonetheless willing to testify against the commander, but did not really know the appellant. The military judge found no unlawful command influence concerning Lt Col Kearney. The military judge found that Capt Plummer's belief was genuine, and concluded that constituted apparent unlawful command influence. For the reasons discussed above, we find this was error. We find no basis in law for finding apparent unlawful command influence based upon Capt Plummer's speculations.

The military judge also considered allegations that Senior Master Sergeant (SMSgt) Parks refused to support the

appellant because of fear of reprisal by the commander. SMSgt Parks was not called as a witness, although he was apparently available. The military judge allowed all the allegations to be presented through hearsay statements from witnesses, primarily Capt Boldt, a defense attorney assisting the trial defense team. The evidence reveals that (then) Master Sergeant (MSgt) Parks received a letter of reprimand from his superior officer for an inappropriate comment. Upon receiving the reprimand, MSgt Parks wadded up the paper and threw it away. MSgt Parks thought the reprimand was unfair, and worried that it would affect his next annual performance report, and his upcoming chance at promotion. The appellant approached MSgt Parks and requested a statement attesting to the appellant's character. MSgt Parks did not feel he knew the appellant well enough to provide such a statement. MSgt Parks was also worried initially that supporting the appellant would anger the command and adversely affect his opportunity for promotion. While the case progressed, MSgt Parks received a performance report unaffected by the reprimand and was subsequently promoted. Later, SMSgt Parks attended the unit assemblies in which personnel were advised that there would be no repercussions against anyone who assisted the appellant's defense. In the days before trial, he changed his mind and had "no opinion" about whether assisting the defense would adversely affect his career. However, according to the appellant, in a private telephone conversation just before trial, SMSgt Parks indicated that he did not want to support the appellant because he feared it would affect a future assignment. The prosecution did not call SMSgt Parks as a witness.

Ruling on the motion, the military judge found:

> With respect to Senior Master Sergeant Parks, the information presented indicates a fear of reprisal is the reason that he does not want to

> provide support. The defense has therefore presented information which, if true, constitutes unlawful command influence. The government has failed to meet its burden by clear and convincing evidence that unlawful command influence does not exist with respect to Senior Master Sergeant Parks.

Rather than making more detailed findings of fact, the military judge provided a single factual conclusion; i.e. that SMSgt Park's fear of reprisal was the reason he did not want to assist the defense. This finding does not comport with the weight of the evidence. Nonetheless, we must find that the military judge's finding of fact regarding SMSgt Parks was not "clearly-erroneous" because there was some evidence (the appellant's self-serving statement) that could support the finding.

Reviewing the military judge's conclusions of law de novo, we find error. We note the military judge applied the wrong standard, asserting that the government failed to disprove the allegations by "clear and convincing evidence" rather than "beyond a reasonable doubt." *See Biagase*, 50 M.J. at 151. We find no prejudice to the appellant from this, however. If the government did not disprove the allegation by clear and convincing evidence, then it would not have satisfied the more stringent "beyond a reasonable doubt" standard.

The more significant error in the military judge's conclusion of law is her determination that the facts provided a basis for a finding of unlawful command influence. SMSgt Parks' fear is a fact, but the fact of his fear does not raise an issue of unlawful command influence under the circumstances. A reasonable person who knew all the facts surrounding SMSgt Park's administrative discipline and subsequent promotion would not conclude that the command

would engage in unlawful reprisal if SMSgt Parks testified for the appellant. No matter how sincerely SMSgt Parks believed it, it is nothing more than unfounded speculation.

The military judge also found that the commander's actions in announcing the charges and placing limitations upon the appellant's personal access to information from within the unit's information systems were not improper. We agree. The restrictions on access were reasonable in light of the heightened security interests involved. There is no evidence the appellant was denied any information relevant or necessary to his defense.

We are also convinced beyond a reasonable doubt that actual or apparent unlawful command influence, if any, did not prejudice the proceedings or affect the findings or sentence. *Id.* Because of her findings regarding SMSgt Parks and "the totality of the circumstances," the military judge ordered remedial measures. She ruled that she would grant any motion to compel the production of any witness from the unit, and ordered the command staff excluded from the courtroom and its environs. She also directed trial counsel to offer a point of contact for all defense witness in the event they feel they are the victims of reprisal. Subsequently, the defense (joined by the prosecution) asked the military judge to order another unit meeting, so that trial counsel could inform all unit members of their right to cooperate. The military judge ordered the additional remedy, and it was carried out the next day.

The case proceeded to trial on the merits. The defense did not ask the military judge to compel the production of any witness, and did not present a "good character" defense in findings. During the sentencing portion of the case, the defense presented 25 character statements, including letters from Lt Col Rattray, a member of the unit, and Capt Plummer. Under the circumstances,

any possibility of prejudice was eliminated. *See United States v. Rivers*, 49 M.J. 434, 443 (1998).

Legal and Factual Sufficiency of the Evidence—18 U.S.C. § 2422(b)

The appellant maintains that the evidence is legally and factually insufficient to support his conviction for violating 18 U.S.C. § 2422(b) by using the Internet to attempt to persuade, induce, or entice a person under 18 years of age to engage in unlawful sexual activity. We do not agree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we will approve only those findings of guilt we determine to be correct in both law and fact. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). This is the test we employ in this case. *But see United States v. Nazario*, 56 M.J. 572 (A.F. Ct. Crim. App. 2001); *United States v. Washington*, 54 M.J. 936, 941 (A.F. Ct. Crim. App. 2001) (indicating Congress intended this Court to employ a preponderance of the evidence test in determining the factual sufficiency of the evidence).

On appeal, as he did at trial, the appellant argues that he did not have the specific intent to commit the charged offense when he engaged in the conversations over the computer. The thrust of the appellant's argument is that the electronic conversation on the Internet was simply a

fantasy—an "Internet play game"—and that he had no intention of ever meeting the other person or engaging in sexual relations. He argues that the "culture of skepticism" in this fantasy world is such that he did not really believe that the person communicating with him was a 15 year-old boy. The argument is significantly undercut by the fact that the appellant actually traveled—twice—in an attempt to meet the other person.

The appellant also offers an alternative argument, claiming that he did intend to meet the other correspondent for the purpose of "just going shopping," or to serve as a mentor for an obviously troubled young man. Of course, this second argument contradicts the first regarding whether he wanted to meet and who he expected to meet. Moreover, the explicit nature of the sexual discussion indicates the purpose of the proposed meeting was to be a sexual, not merely social, encounter.

The appellant's argument that the law enforcement agents entrapped him is unpersuasive. The detectives provided the appellant an opportunity to commit the offense, but the idea of the crime did not originate with the government. *See* Rule for Courts-Martial (R.C.M.) 916(g). The law enforcement officers were skillful in pressing the appellant to declare what he wanted without first suggesting what that should be. In any event, it is clear the appellant was predisposed to use the Internet to set up meetings with other males for sexual relations. He admitted to the arresting officers that just the night before he had engaged in oral sodomy with a male he met over the Internet. While that would not have violated 18 U.S.C. § 2422(b) absent proof that the individual was under 18 years old, it is still an offense under the UCMJ. Article 125, UCMJ, 10 U.S.C. § 925.

Jurisdiction and "Permission to Proceed"

Citing *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant maintains that, before prosecuting him, the Air Force failed to obtain permission from all necessary agencies as required by Air Force Instruction (AFI) 31-501, *USAF Personnel Security Program*, ¶ 8.9 (2 May 1994). He argues that, as a result, the court-martial lacked jurisdiction over his case. We do not agree.

The appellant had access to highly classified programs. When these offenses came to light, his access was removed. Under AFI 31-501, a commander contemplating disciplinary action that could result in the removal of the subject from the service must request permission to proceed from the agencies that grant the security clearances. Paragraph 8.9.8 provided, in pertinent part, "Under no circumstances may the charges be referred to trial until the appropriate action office grants authority to proceed." The appellant concedes that the government obtained permission from his unit, the Air Force Operational Test and Evaluation Center, to proceed to trial, but argues that it failed to properly obtain permission from other affected agencies.

It is unnecessary for this Court to determine whether permission to proceed was properly obtained in this case. The Constitution of the United States gives Congress the authority to regulate the land and naval forces. U.S. Const. art. I, § 8, cl. 14. Congress established the jurisdiction of courts-martial through the UCMJ. The appellant does not suggest that he does not meet the jurisdictional requirements of the UCMJ.

The appellant alleges a violation of an Air Force regulation. However, military courts are not justified in attaching jurisdictional significance to service regulations in

the absence of their express characterization as such by Congress. *United States v. Kohut*, 44 M.J. 245, 249 (1996); *United States v. Jette*, 25 M.J. 16, 18 (C.M.A. 1987). The violation of a regulation may be asserted by an accused only if it was prescribed to protect an accused's rights. *United States v. Sloan*, 35 M.J. 4, 9 (C.M.A. 1992).

In this case, the regulation in question is a policy statement designed to protect the interests of the Air Force in classified information, rather than to provide personal rights to one who holds a security clearance. Even assuming arguendo that there was a violation, it would not deprive the court-martial of jurisdiction.

Factual and Legal Sufficiency—Disobey Order/Dereliction of Duty

The appellant was convicted of negligent dereliction of duty between 15 June 1998 and 30 October 1998 for using his government computer for other than official purposes. He was also found guilty of disobeying a lawful order not to use his computer to play fantasy football on divers occasions between 2 November 1998 and 5 December 1998. Citing *Grostefon*, the appellant argues the evidence was legally and factually insufficient to support the convictions. We disagree.

At the time of the offenses, regulations required government personnel to use government equipment for official purposes only. Commanders were authorized to allow some limited personal use of computers, provided it did not adversely impact duty performance and was in the best interests of the Air Force. The appellant notes that others in the organization used their government computers for personal purposes. He argues, as he did at trial, that he was mistaken about whether his use of the government computer to access and use fantasy football statistics was

permissible. However, the evidence reveals that superior officers specifically told the appellant—three times—not to use his government computer to engage in fantasy football activities. Under the circumstances, his claim of ignorance is unpersuasive. The evidence is legally sufficient to support the conviction, and we are also convinced beyond a reasonable doubt of the appellant's guilt.

Sentence Appropriateness

The appellant argues that his sentence is inappropriately severe, in light of his years of service, his record of performance, and the nature of the offenses. We do not agree.

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires this Court to approve only that sentence, or such part or amount of the sentence, as it finds correct in law and fact and determines should be approved. The determination of sentence appropriateness "involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). In order to determine the appropriateness of the sentence, this Court must consider the particular appellant, the nature and seriousness of the offense, the appellant's record of service and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Alls*, 47 M.J. 817, 828 (A.F. Ct. Crim. App. 1998).

We find the sentence appropriate for the offenses and the offender. The appellant committed a serious crime by attempting to entice what he believed to be a 15-year-old boy into a sexual encounter. The offense reflects great discredit not only upon the appellant but the entire Air Force. We realize that the wrongful use of a government computer is, by itself, a relatively minor transgression. However, the

offenses were aggravated in this case because the appellant repeatedly failed to follow, or intentionally disobeyed, instructions from superior officers telling him not to use his computer for these purposes.

The approved findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

/s/

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator